NO. 12250

United States
Court of Appeals
For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR., MARY LOU SCHIEL and LORAINE SCHIEL,
Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, A Corporation,
Appellee.

Reply Brief of Appellants

CRAWFORD & BAKER,
A. M. CRAWFORD,
A. G. BAKER.
The Bank of Arizona Building,
Prescott, Arizona
Attorneys for Appellants.

PRESCOTT COURIER

NO. 12250

United States
Court of Appeals
For the Ninth Circuit

VIRDIE SCHIEL, FRANK SCHIEL, SR., MARY LOU SCHIEL and LORAINE SCHIEL,
Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY, A Corporation,
Appellee.

Reply Brief of Appellants

Reply to Appellee's Argument I "Judgment of Reformation Not Open for Review"

Appellee claims presumably that the judgment for reformation was final, and appellants were *required* to appeal from it without awaiting final judgment in the case. This is not so. As we have pointed out, the appellee started this suit before appellants considered negotiations were ended and before they

felt it necessary to bring their action for recovery. In the complaint not only reformation was asked, but appellee made the suit unquestionably a contest by setting out that insured was killed as a result of operating an aircraft contrary to the aviation clause, and asked that appellants be required to accept a "reserve" as final judgment in the whole case. (Lanier case cited by both parties hereto).

Under the rules appellants were compelled to set up their cross-claim for recovery of insurance, else they would have waived it and lost their right. There was no "invoking" of common law jurisdiction by appellants. The reformation and other judgments requested by appellee and the cross-claim of appellants became one case (29 Am.Jur.246) by the rules and order of the court. The court took up the reformation part as the preliminary issue necessary to be decided before the case as a whole could be tried and final judgment given. Reformation is granted even though no recovery can be had by reason thereof, Kelsey v Agriculture (N.J.) 79 A.539. So the court could thereafter have made a final judgment for appellants on the whole case, in spite of reformation. In fact the order of reformation left undecided the other demands for relief above mentioned, in appellee's own Complaint. If appellants had appealed before the final judgment, this Court would have dismissed the appeal as premature because there would have been no injury to them and unless the

lower court made a final decision against them on the whole case.

It is elementary that no appeal can be taken unless statutes so provide. No statute has been cited giving appeal from a preliminary order of reformation in a case like this where the rules compel the equity and law issues to be litigated. The only appeals from interlocutory decrees are given under 28 U.S.C. Par.227, in cases of injunctions, receivers and admiralty. There is no case cited or found that holds that reformation, when a preliminary equity issue in a case like this, *must* be appealed before final judgment. The Supreme Court, and many other courts, have dismissed many appeals made on preliminary rulings and before final disposition of the whole case. They have said that a case cannot be brought up "in parcels". The cases seem clear also that even where some such judgments are final for purposes of appeal, such appeal may be made, but is not *required* to be made, until final judgment in the whole case.

Arnold v U. S., 263 U. S. 427 (cited in Opening Brief) shows that an appeal from the preliminary judgment of reformation could not have been maintained.

Bowker v U.S., 186 U.S. 135: A case cannot be brought up in parcels.

Crooker v Knudsen (CA 9) 232 Fed.858: Decisions are not appealable unless made so by statute. No judgment is final which does not terminate the litigation between the parties on the merits. O'Brien Manual Fed. Appel. Proc. pp 23, 25, 28, 29. Victor

Talking Machine v George (CA 3) 105 F (2d) 697, which states the rules and show that an appeal is not required until final determination of the whole case.

Also: 4 C.J.S. p. 180; American Mills v American Surety, 260 U.S. 362; Hamilton-Brown v Wolf, 240 U.S. 257; Adler v Seaman (CA 8) 266 Fed. 840; Western Silo v Morris (CA 8) 33 F. (2d) 285; Frick v Namm, 21 F. (2d) 179; Johnson v Solomons (Cal) 12 Pac. (2d) 140.

If an appeal from a decision on the reformation issue in a case like this *must* be made without waiting for final judgment, there should be statute so requiring. Otherwise how can an appellant tell. Must an experiment be made to find out whether appealable. We submit that in equity as well as by law and court decisions this reformation issue in this kind of a case is reviewable on this appeal from the final judgment and any other intermediate order.

IIA

Reply to Appellee's II A "Inclusion of Aviation Clause as Condition of Reinstatement."

In this Argument appellee says that it "could have unconditionally rejected the application for reinstatement" and "As appellee had the right to refuse reinstatement completely, it follows that it could elect to offer reinstatement upon any condition it wished to impose." To be fair to an insured, then, that Clause should read "No reinstatement will be

made at any time unless the company in its sole judgment so desires."

The Greenberg case concerns an accident and health policy, not life insurance. Cases distinguish these two kinds (Greber v Equitable, 43 Ariz. 13; 28 Pac. (2d) 817); and this Greenberg opinion points out authorities (647) holding that the insured has a right (on reinstatement) to the same conditions, and insurer has "no right to exact other conditions."

II B

Reply to Argument II B "Reformation was not precluded by the Incontestable Clause"

Appellee considers that the decision in the Richardson case is erroneous. It says that two judges are against a claimed thirty five. If a thing is right, the fact that a majority oppose does not make it less righteous. However we respectfully urge that the two do not take their "minority" too much to heart until they see what many other judges in cases cited by us, as well as many others, have thought of the principles underlying the Richardson case. It may be found they are in a minority so large as to be a majority.

Numerous cases also bring out that an insurance "contract" and the construction thereof should be considered with the fact that there are skilful, expert and accurate parties on one side, and ordinarily pa-

pers are simply accepted by a novice. He does not know of any possibility that a "contest" will not mean all contests. And that when the company, after he is dead, discovers an application that he signed on the dotted line and forgot, it can sue to reform the policy and escape paying insurance that his family was depending on.

We think that the decision in Richardson that reformation, as applied in a case like this Schiel cause, cannot be made after the incontestable period, needs no defense.

Appellee talks about the "true agreement" as if signing an application made a contract. There is no contract until the policy is accepted by the insured. And then the insured can rely on it. Northwestern v Chambers, 24 Ariz. 86, cited by appellee confirms: The "insured has the right to rely on the presumption that the policy he receives is in accordance with the application." If it is not, only the insured can complain; the insurer should not be allowed to change the policy after the contestable period.

American Merchant Marine v Tremaine, cited, seems clearly inapplicable for appellee. The court says: "The appellant is not here attempting to assert rights under the contract." In this Schiel case, from the start, appellee was asserting rights under the contract—to have the court declare that insured was killed within the conditions of the aviation clause, and to declare appellants must accept the reserve.

Appellee thus made a contest; it did not ask reformation alone, but went on and asserted rights. So even under cases that allow reformation because not considered a contest, appellee has no support. It should have asked for reformation only; then waited to see if appellants would assert a right of recovery. The Tremaine case therefore seems conclusive that the complaint in this case, "attempting to assert rights under the contract" made a contest.

The Buck case is simply correcting a figure that already was *in* the policy. Court: "The appellant is not attempting to dispute the policy nor prevent a recovery thereon." Correcting a figure *in* a policy is quite different from asking to insert an outside clause and prevent recovery of the insurance thereby.

There is no Arizona case deciding the questions herein, as appellee seems to infer. There is no case supporting the Columbian case rule in any way. Arizona cases cited certainly do not support any claim that they have decided that a reformation by adding a clause which might prevent recovery, would be allowed after death of the insured and after the incontestable period. The Korrick case relates to reformation of a deed. Posner case relates to accident insurance not to life. The court restricts its statement to "policies of this nature."

II D

Reply to II D "Reformation Demanded by Mutual Mistake."

Flimin's case is not a leading one. In deciding on "the natural and reasonable inferences" that there was mutual mistake the case is contrary to numerous federal and other cases, cited by us, that on application to reform mistakes must be supported by clear, unequivocal and convincing proof. (Also Harrison v Hartford, 30 Fed. 862; Bowers v N. Y. Life, 68 Fed. 785; Travelers v Henderson (CA 8) 69 Fed. 762). Let us suppose that there had been an application clause wherein Schiel had asked something favorable to him, as waiver by the company of the suicide clause. The company does not attach this to the policy issued to him. He does not notice the omission. After his death (if it had been suicide) some note is found by the beneficiaries among his effects that some such request had been made. They have no copy of the clause to prove anything. They write to the N. Y. Life. It replies saying that "by reason of mistake, inadvertence or oversight" of their employees the company has no record, if any clause was ever received. Anyway it had the right to refuse and send him the policy for him to accept if he desired, and he had done this. Would the beneficiaries get a reformation against the company?

The "reasonable" inference" and we think the

clear evidence in this Schiel case is that there was no mutual mistake. But negligence or lack of reasonable care by the company which had opportunity even later to correct if there had been error, reasonably accounts for the claimed error.

It is common knowledge that the ordinary person signs an application as the agent urges and takes the agent's interpretation of what is meant in the statement he is signing. The insured feels he can find out what he has signed when the policy comes, and can either accept or refuse. He is not given any copy of what he signs at the time. The application in this case states the insurance shall not take effect until and unless the policy is delivered (R 16). How can an insured be held to have made a contract until the policy is delivered and received. How can he be held as having completed any agreement which is not attached to the policy when issued, so that he can be definitely advised of what the company is including as the final contract. Cannot an insured, not guilty of fraud or effort to get undue profit, rely on the policy offered to him for acceptance, as including all the contract so far as the company is concerned. In this case a "reasonable inference" is that Schiel, if an aviation clause had been attached, might in going over the policy before acceptance have made more inquiry as to the effect of the clause. If he had been advised that there was a possible conflict with the military clause he could have declined to accept

until cleared up to his satisfaction. There would then have been no "mutual mistake", and it can not be assumed that he made a mutual mistake in accepting the policy without any such aviation clause. He was not given a fair chance. It is, to say the least, unfair to refuse to let an unskilled insured rely upon the policy delivered under the facts of this case.

III

Reply to III A "Appellee Was Entitled to Summary Judgment A. No Genuine Issue as to Any Material Fact"

Appellee has not answered our statement of the fact, beyond dispute, that the deposition of Major Marshall taken in Washington, and the copies of some of the war records obtained, were never offered in evidence so that objection or rebuttal could be made. And they were never introduced; merely put with the file of the case as in any deposition sent to the Clerk for custody until trial.

Appellee ignores Title 28 U.S.C.A. Par. 695, which in providing that records made in regular course of business are admissible, permits "all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to affect its weight." This does not change the shop book rule so as to make such records prima facie and considered as being automatically admitted without being offered at any

trial. In Arizona at time of trial the deposition can be challenged until the party offering shows that the witness is not in Arizona available at the trial. Such records should not be admitted en masse. (Lundblad v U.S. 98 Ct. Claims 397, cited in notes to said Par. 695).

The Gilmore case cited does not say that records simply filed in the Clerk's office, as here, are ipso facto prima facie evidence which can be considered as conclusive without presentation and opportunity to rebut.

Appellee says that the affidavit of Frank Schiel Sr. (p 3 its brief) was "presumably for the purpose of casting doubt upon the accuracy of the records", and (p 23) is "wholly hearsay." The affidavit was made when motion was made for summary judgment on the Meares affidavit that proof of loss listed "plane crash" as the cause of death. Appellee seemed to consider this conclusive. Therefore it was necessary for us to make the Schiel affidavit in reply, so as to not waive the issue as permitted by the settled rule that admissions in such proofs to insurance companie are subject to explanation. They are not conclusive and proof may be presented that they are erroneous. Appellants were prepared to testify on a trial, but when this motion was made the affidavit was filed with the objection to the motion. The affidavit showed that the listing was given as plane crash on hearsay presumption but information later

made the reason doubtful, and certainly the statement was not any admission, or intended as any, that death or plane crash came *within any aviation clause* which had never been attached to the policy held by appellants. (Supreme Lodge v Beck, 181 U.S. 49, 94 Fed. 752 in lower court; and Culley v N. Y. Life (Cal) 163 Pac (2d) 703).

As to hearsay we consider it ill becomes appellee to make any criticism. It is apparent on the face of the deposition and war records that they were substantially if not wholly hearsay. They were made by persons who had no personal knowledge whatever as to this death of an honored air force youth in China. These Washington records were in turn based on statements made by persons in China who had no personal knowledge but who gathered information from any possible hearsay source, naturally inaccurate and incomplete in an active battle area where careful investigation of what had occurred without witness in a remote and practically inaccessible place was impossible. The witness in the deposition, Major Marshall, admittedly had no personal knowledge; but he was never the less asked for his personal opinion of interpretations of the records of events he personally knew nothing about. He was not asked and did not testify that these were *all* the records on this case. It was the duty of appellee to show this, especially as the records show the date of death had at first been stated as a different date,

and other records did not harmonize on other statements. The statement in the Schiel affidavit was by Major Baumler who was a personal friend and with Major Schiel in the Flying Tigers and present in the vicinity at the time of death. This is not "wholly hearsay". At one place he states that he was told by the engineering crew. But much is what he as a companion in arms personally knew, being on the ground inChina. At any rate what appellants stated as plane crash in the proof of loss was based on hearsay; if the affidavit could not be considered, then it is also unfair to try to hold them to their statement made in good faith based upon hearsay.

III B

Reply to III B "Death Arising from Military Service Does Not Preclude Application of Aviation Clause."

Appellee simply cites cases which it considers support the above. It must, and apparently does, acknowledge that there are other cases to the contrary. We submit that these other cases support the more liberal and fair view that where there is a military clause and an aviation clause, the death of a soldier as a battle casualty in the battle area is a risk of war and insurance is payable. The appellee's cases take a narrow and stringent view that a contract calls for a construction which will give its "pound of flesh."

Attempt is made to distinguish two of our cases. But this Court will notice that the Bull case decides that a risk of war is covered by insurance where the policy has an aviation clause. The fact that the plane in that case had landed before death (the same might have been true in the Schiel case if all facts were known) is not material to the correctness of the decision and holding that a risk of war (whatever such risks may be decided in each case to be) is covered.

The Boye case also holds that a risk of war is covered, and then decided that death "by plane crashing upon land" would be a "risk of war that the policy did not exclude," and not "due to operating or riding in any kind of aircraft." These are recent decisions, the Boye being very recent, decided by the Court of Appeals of the District of Columbia. We urge that this fair and reasonable rule be followed.

It will be noted that no answer is made to our Argument II B, that neither the incontestable nor the military clauses were indorsed to show a modification by an added clause, if change was intended. No explanation is made of the Durland case where such indorsements were made by this same company on the same kind of policy and clauses as in the case at bar. The court indicates that if such indorsements had not been made the decision would have been against the company. By making such indorsements there is in effect an admission by this company that

they should have been made on this policy. There was no attempt by the company to reform by having the indorsements added in this case.

Also no answer to our point in the first part of our Argument II, in which we ask how the military and other clauses which had become incontestable before this suit, can be violated and made of no effect by simply ordering this aviation clause to be added to the policy. Certainly the aviation clause cannot be considered as having been added prior to the commencement of the incontestable period in 1941. If it were so considered the military clause is allowed to be violated, contested and made of no effect, contrary to the incontestable clause. This would mean that an incontestable clause is worthless as to all clauses that may conflict when a reformation by addition of a clause eliminating a risk in the original policy is allowed after the contestable period.

CONCLUSION

This is not a case where there was any fraud or lack of good faith on the part of the insured. It is the case of a young man, who later made an outstanding and honorable record, and who had tried to protect his parents and sisters by insurance. Did he do so? We think he did. It is respectfully submitted that for any or all the reasons assigned the

judgment of the lower court be reversed and judgment entered for appellants for the amount of insurance clearly stated in the policy, to be paid as provided in the policy, with interest on past due payments.

Respectfully,

CRAWFORD & BAKER
By A. G. Baker,
Attorneys for Appellants.

The Bank of Arizona Building
Prescott, Arizona.